

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the matter of:

U.S. DEPARTMENT OF ENERGY

(License Application for Geologic Repository
At Yucca Mountain)

Docket No. 63-001

ASLBP Nos. 09-876-HLW-CAB-01

09-877-HLW-CAB-02

09-878-HLW-CAB-03

March 11, 2009

**MOTION FOR CERTIFICATION OF LICENSING SUPPORT NETWORK OUT OF
TIME FOR GOOD CAUSE**

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Counsel for the Timbisha Shoshone
Tribe

INTRODUCTION

The Timbisha Shoshone Tribe ("Tribe") submits this request to file the attached initial certification of the Tribe's licensing support network ("LSN") out of time for good cause pursuant to 10 C.F.R. §§ 2.307, 2.1003, and 2.1012(b). This request is submitted by the duly recognized representatives of the Timbisha Shoshone Tribe and is filed on behalf of the Tribe.

The Tribe is submitting this motion to both the Atomic Safety and Licensing Board (the "Board"), and the Pre-Application Presiding Officer ("PAPO") as it is not clear procedurally which body would provide the certification for the LSN at this time. However, the regulations do allow for compliance subsequent to filing a petition for intervention pursuant to 10 C.F.R. § 2.1012(b)(2), therefore one or both entities have the authority to allow such certification at this time.

GOOD CAUSE FOR CERTIFICATION OUT OF TIME

The Tribe has made every attempt to substantially and timely comply with the requirements set forth in 10 C.F.R. Part 2 as to participation in this proceeding and the PAPO proceeding. However, the Tribe has suffered numerous internal and external difficulties that have delayed or prevented its timely initial certification of the LSN. The Tribe submitted its initial petition for affected Indian tribe ("AIT") status to the Department of Interior ("Interior") in 2001 shortly after the Shoshone Homelands Act returned certain lands within the Yucca Mountain Project area to the Tribe, and created federally possessory and usage rights to other lands within the Project area. Interior initially informed the Tribe that it would not approve its petition for AIT status. The Tribe then filed an amended petition in early 2006 renewing its request for AIT status.¹ From 2006 to June of 2007 the Tribe, through its counsel, submitted additional information to Interior, met with Interior officials and actively pursued the Tribe's right to AIT status,

¹ The Tribe continued to actively pursue its right to AIT between 2001 and 2006 through involvement with other Tribes and organizations concerned about the Project, through political lobbying, and participation in DOE tribal workgroups, as well as pleas to the public through the media.

including its right to participate in this proceeding. In June of 2007 Interior finally granted the Tribe AIT status in this process. See letter from Department of Interior dated June 29, 2007, attached hereto as Exhibit A. Unfortunately, the timing for granting AIT status did not coincide with the Federal budget process, and the Tribe was not included in the Department of Energy's ("DOE") 2008 budget request. Interior certified the Tribe's status as an AIT affirming its right to participate in the process, but left the Tribe with no resources to participate in the process.

By 2007 many, if not all of the other affected units of local government had oversight programs in place, hired experts, and were actively involved in ongoing consultations with DOE for many years (some since the 1980s). The Tribe after years of seeking AIT status was now left to fend for itself, despite the Federal trust responsibility to the Tribe, and the premise that this licensing process should allow for meaningful participation by affected government entities, as well as provide transparency. See *Affected units of Local Government Yucca Mountain Project 1998 Annual Report*, at pg. 1 found at <http://www.yuccamountain.org/report01.htm>; and *County of Esmeralda v. U.S. Department of Energy*, 925 F.2d 1216 (1991).

The Tribe actively moved forward to the extent possible in its participation and oversight of the Project, despite its limited resources. The Tribe met with officials from DOE and Interior to request funds for its participation. The Tribe met with potential consultants to put together its oversight program, including the LSN, in a very few months. DOE and other affected governments had years to develop and implement their oversight programs, and LSNs. In the midst of sorting through the complex and numerous requirements for implementation of the oversight program, participation in the the high level waste ("HLW") licensing process, and developing an LSN, the Tribe's government developed internal conflicts that resulted in a split in the tribal government.

It was not until late 2008, after the intra-tribal dispute, that the Tribe was able to retain and work with a consultant to ensure full compliance with the LSN requirements.

The Tribe worked diligently with its consultant, Loreen Pitchford, NWOP Consulting Inc., to develop and implement an LSN that substantially meets all regulatory requirements set forth in 10 C.F.R. § 2.1003. See attached *Certification of Timbisha Shoshone Tribe LSN Document Collection* dated March 11, 2009. The Tribe did not meet the timeliness requirement for filing its initial certification of the LSN within 90 days after DOE certification of compliance under 10 C.F.R. § 2.1009(b). See 10 C.F.R. § 2.1003. In order to address the late filing of certification, and to make a sincere effort to contact other parties pursuant to 10 C.F.R. § 2.323, the Tribe sent out an email in December of 2008 stating it would be filing a motion to request filing the certification of its LSN out of time. The Tribe then specifically conferred with DOE as to the late filing. DOE then requested that the Tribe provide DOE its procedures before filing the certification. This occurred on or about December 16, 2008. The Tribe, again with no resources, was faced with having to choose between consulting on LSN procedures with DOE, or timely filing a Petition to Intervene in the HLW proceeding, as well as address the internal dispute over leadership issues. See letter from Department of Interior dated February 17, 2009 attached hereto as Exhibit B. The Tribe filed a timely Petition, and continued to pursue discussions with DOE as to certification of the LSN.

The Tribe continued its discussions with DOE, and in good faith provided its procedures to DOE for review prior to filing the late certification. The Tribe informed DOE that it intended to file a motion to submit its LSN certification late by Friday January 23, 2009. DOE informed the Tribe on January 19, 2009 through an email from Kelly Faglioni that it was still reviewing the procedures and would not be able to get back to the Tribe for at least a week. On January 23, 2009, the date the Tribe had anticipated filing its motion, DOE sent an email setting forth a number of issues as to

the LSN, and several discussion points. Counsel for the Tribe reviewed the email and attachments, then consulted with the Tribe's LSN Administrator, the Tribal Council, and other parties with certified LSNs. The majority of the issues raised by DOE did not seem appropriate, and were excessive in nature given the circumstances and content/procedures of other certified LSNs. The Tribe has consulted with and retained a national expert in this area that has certified numerous LSNs for other (potential) parties. There is no distinction as to the procedures that the Tribe is following compared with other certified LSNs, therefore the Tribe submits this request after careful consideration of the comments provided by DOE, and in consideration of the need to move forward with certification as quickly as possible to ensure compliance with 10 C.F.R. §§ 2.1003 and 2.1012.

Also it should be noted that all documents referenced by the Tribe are either generally publicly available documents, or documents listed on other (potential) parties certified LSNs. Therefore, there is no prejudice to any party including DOE and NRC Staff.

Compliance with 10 C.F.R. §2.323

The Tribe has made a sincere effort to contact other parties pursuant to 10 C.F.R. § 2.232. DOE has been fully aware of the Tribe's intent to file for late certification of its LSN since mid-December 2008. The Tribe sent out an email on March 10, 2009 at 4:12 PDT to inform the parties that it intended to file this motion. The Tribe received responses from the California, Nevada and Eureka County with no objections. Counsel for the Tribe spoke with Counsel for NRC Staff on March 11, 2009, as to the filing of this motion. NRC Staff does not oppose the filing of the motion, but reserves the right to respond if warranted.

CONCLUSION

The Tribe respectfully requests that the Board or the PAPO Board the Tribe leave to file its initial LSN Certification out of time for good cause shown.

DATED: March 11, 2009

Respectfully submitted

Fredericks Peebles & Morgan LLP

/s/ Darcie L. Houck

Darcie L. Houck

Counsel for Timbisha Shoshone Tribe

EXHIBIT A

United States Department of the Interior

Office of the Solicitor
Washington, D.C. 20240

**DIVISION OF INDIAN AFFAIRS
TRANSMITTAL SHEET**

DATE: June 29, 2007
TO: Darcie L. Houck, Esq.
Monteau & Peebles LLP
FAX NUMBER: (916) 441-2067
PHONE NUMBER: (916) 441-2700
TOTAL PAGE(S): 5 (Including cover page)

FROM: Karen Lindquist
Department of the Interior
Office of the Solicitor
Division of Indian Affairs
Washington, D.C. 20240
(202) 208-4361
(202) 219-1791 - Fax

COMMENTS: Darcie - Here is a copy of the letter. The ASIA's office will be mailing the original directly to the Tribe. Thanks! KEL

Confidentiality Notice: This communication is intended for the sole use of the person to whom it is addressed and may contain information that is privileged, confidential and exempt from disclosure. Any dissemination, distribution or copying of this communication by anyone other than the intended recipient or the person responsible for its delivery is strictly prohibited. If you have received this communication in error, please phone this office immediately at (202) 208-4361.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JUN 29 2007

The Honorable Joe Kennedy
Chairman, Timbisha Shoshone Tribe
785 N. Main Street
Suite Q
Bishop, California 93514

Re: Amended Petition Seeking Determination of Affected Indian Tribe Status Under
the Nuclear Waste Policy Act

Dear Mr. Chairman:

The Department of Energy identified Yucca Mountain, located on federally protected land within the boundaries of the Nevada Test Site in Nye County, Nevada, as a potential permanent site for the nation's high-level nuclear waste repository. The Nuclear Policy Waste Act ("the Act") of 1982, as amended, established the Federal Government's responsibility: 1) to provide a location(s) for the permanent disposal of high-level radioactive waste and spent nuclear fuel, and 2) that the generators are responsible for bearing the costs of the permanent disposal. The Act provides for extensive State, tribal, and public participation in both the planning and development of permanent repositories.

The Act affords certain rights and status to Indian tribes who are deemed an affected Indian tribe. If a tribe is found to be an affected Indian tribe, the tribe is eligible to participate in the planning of repository site decisions and to receive financial assistance to conduct studies, assessments, and other oversight activities associated with the Yucca Mountain Site. The Act defines "affected Indian tribe" as any Indian tribe:

- a) within whose reservation boundaries a monitored retrievable storage facility, test and evaluation facility, or a repository for high-level radioactive waste or spent fuel is proposed to be located;
- b) whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of congressionally ratified treaties may be substantially and adversely affected by the locating of such facility; *Provided*, That the Secretary of the Interior finds, upon petition of the appropriate governmental officials of the tribe, that such effects are both substantial and adverse to the tribe.

42 U.S.C. § 10101(2).

The Act set forth the procedures for siting and development of the high-level radioactive waste geologic repositories and the respective roles for the Nuclear Regulatory Commission ("NRC"), the Department of Energy, the States, and Indian tribes. The NRC was responsible for revising its regulations that were applicable to the disposal of high-level radioactive wastes in geologic repositories as a result of the Act. The NRC published draft regulations and received public comments. The regulations were issued as final and became effective on August 29, 1986. The final regulations dealt with the procedural aspects of site characterization, the participation of States and Indian tribes, and other amendments necessary for the regulations to reflect the provisions of the Act.¹

According to the Supplemental Information contained within the Final Rule, the definition of "affected Indian tribe" was changed based upon public comments received: "In response to comments, the final rule defines the term "affected Indian tribe" so as to include, for purposes of these regulations, Indian tribes having off-reservation rights arising out of "other Federal law" as well as "out of Congressionally ratified treaties", provided that specified findings have been made by the Secretary of the Interior. This would place all Indian tribes on the same footing as long as their rights arise under Federal law irrespective of the legal form in which such rights may have been documented." 51 FR 27158 (July 30, 1986). The current interpretation of the Act and the implementing regulations define affected Indian tribe as any Indian tribe:

- 1) within whose reservation boundaries a repository for high-level radioactive waste or spent fuel is proposed to be located; or
- 2) whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of Congressionally ratified treaties or other Federal law may be substantially and adversely affected by the locating of such a facility; Provided, That the Secretary of the Interior finds, upon the petition of the appropriate governmental officials of the Tribe, that such effects are both substantial and adverse to the Tribe.

10 CFR 60.2.

On February 10, 2006, the Timbisha Shoshone Tribe ("the Tribe") submitted an amended petition to the Secretary of the Interior to certify that the Tribe qualifies as an affected Indian tribe within the meaning of 42 U.S.C. § 10101 and 10 CFR 60 *et seq.* In order for the Tribe to be deemed an affected Indian tribe in accordance with the Act and its implementing regulations, the following conditions must be met: 1) the Tribe must meet the definition of Indian tribe in accordance with 10 CFR 60.2; 2) the Tribe must possess either Congressionally ratified treaty rights or other Federal legal rights to lands outside of the boundaries of the reservation; and 3) the Secretary must find that these rights may be substantially and adversely affected by the location of a high-level nuclear waste repository at Yucca Mountain.

¹ According to the Background information published with the Final Rule in the Federal Register "These amendments contain the changes to 10 CFR Part 60 that are needed to conform the licensing procedures in the rule to the provisions of the [Act]. In addition, the amendments contain some changes considered desirable in light of the experience gained with the pre-licensing consultation process since the promulgation of the procedural part of 10 CFR Part 60."

Indian Tribe

The Timbisha Shoshone Tribe is eligible for services provided to Indians by the Secretary of the Interior because of their status as Indians and therefore, meets the definition of "Indian tribe" as defined in 42 U.S.C. § 10101(15).

Congressionally Ratified Treaty Rights

The Timbisha Shoshone Tribe urges consideration of the Treaty of Ruby Valley ("Treaty") in its petition, but does not rely on the Treaty for gaining affected Indian tribe status. The Treaty is not sufficient to justify a finding of affected Indian tribe status and will not be relied upon by the Secretary in making a determination. There are no other Congressionally ratified treaties impacting the Tribe that have come to the Secretary's attention in considering this request. Accordingly, the Secretary does not find any Congressional ratified treaties that inform or justify a determination of affected tribe status.

Federally Defined Possessory or Usage Rights Arising Out of Other Federal Law

The Timbisha Shoshone Homeland Act ("Homeland Act"), Public Law 106-423, was enacted on November 1, 2000. The Homeland Act established a permanent land base for the Timbisha Shoshone Tribe within its aboriginal homeland. The Homeland Act states that the Tribe achieved Federal recognition in 1983 and the interests of the Tribe and the United States would be enhanced by the establishment of a land base for the Tribe.² In addition to the establishment of reservation land, the Homeland Act provided the Tribe with usage rights to certain lands, while other specific areas were designated to be jointly managed by the Bureau of Land Management or the National Park Service and the Tribe. These lands were referred collectively to as Special Use Areas.

The Special Use Areas are described as ". . . nonexclusive special use areas for the Tribe . . . Members . . . are authorized to use these areas for low impact, ecologically sustainable, traditional practices pursuant to a jointly established management plan mutually agreed upon by the Tribe, and by the National Park Service or the Bureau of Land Management. . ." 16 U.S.C. § 410 aaa (2000). The Homeland Act provides the Tribe continued use of National Park resources for traditional tribal purposes, practices, and activities for those special use areas within the boundaries of Death Valley National Park ("Park"). Other special use areas were designated outside of the Park on Bureau of Land Management lands.

² In addition to the special use areas and the establishment of reservation lands, the Homeland Act makes specific references to ground water associated with the reservation lands. If the Secretary determines that there is insufficient ground water to fulfill the purposes associated with the transfer of the lands, the Secretary and the Tribe are to work together to find substitute lands within the management of the BLM.

Federally Defined Possessory or Usage Rights Arising Out of Other Federal Law are Substantially and Adversely Affected

We find further that the proposed location for the permanent disposal of high-level radioactive waste and spent nuclear fuel is not only in close proximity to the Tribe's reservation lands but is also close to the Tribe's special use lands. The special use lands, as well as the reservation lands, are used by the Tribe for various activities and, based upon the Tribe's petition, there is a potential of significant groundwater contamination as a result of the high-level radioactive disposal. There is also a possibility that transportation routes for emergency response vehicles will travel through, or will impact activity on or around the special use lands. At this time the Tribe has not provided scientific data to prove that the disposal facility will indeed have an adverse impact on the special use lands. The potential for adverse impact remains due to the proximity of the facility.

The Yucca Mountain high-level radioactive disposal site will be a major tribal concern for the potentially adverse health, safety, and environmental impacts of that may be generated as a result of the site location. As the Tribe stated in their petition, "In order to ensure that these risks are limited, the tribe needs to; collect data; provide emergency response resources and training; ensure that proper evacuation and radioactive decontamination processes are in place; have access to consultation with DOE and other affected governments on an equal basis; and monitor the Yucca Mountain licensing process."

This position is bolstered by an opinion from the Ninth Circuit Court of Appeals which found that "Affected unit status is also meant to ensure that all potential harms from repository operation - whatever the current estimate of their probability - are sufficiently studied before Yucca Mountain is approved as a repository." *County of Esmeralda v. U. S. Department of Energy*, 925 F. 2d 1216, 1220 (1991). The Court vacated respondent's decision not to designate petitioners as affected units and held that petitioners should have the opportunity to participate in the preliminary planning stages of a nuclear waste repository that may, in the future, affect them as contiguous counties to the location of proposed repository. The Counties of Esmeralda and Inyo are contiguous to Nye County. Yucca Mountain is located in Nye County. The Court held that DOE could not disregard the potential of future impacts through these contiguous counties. The Timbisha Shoshone Tribe's reservation lands and special use lands are located within both Esmeralda and Inyo Counties and, thus, are potentially impacted.

Therefore, the Department of the Interior, in accordance with section 2(2)(B) of the Act, certifies that the Timbisha Shoshone Tribe may be substantially and adversely affected by the proposed geologic repository at Yucca Mountain, Nevada, and is an "affected Indian tribe" for purposes of the Act.

Sincerely,


Carl J. Artman
Assistant Secretary - Indian Affairs

EXHIBIT B



IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

FEB 17 2009

CERTIFIED MAIL NO. Z 155 874 769
RETURN RECEIPT REQUESTED

John M. Peebles, Esq.
Fredericks Peebles & Morgan LLP
Attorneys at Law
1001 Second Street
Sacramento, CA 95814

Dear Mr. Peebles

The purpose of this correspondence is to inform you of my decision regarding the Notice of Appeal (Appeal) dated March 17, 2008, filed pursuant to 25 Code of Federal Regulations (CFR) Part 2, by John M. Peebles, Attorney for Ed Beaman, Virginia Beck, and Cleveland Casey (Appellants), from the Bureau of Indian Affairs, Central California Agency, Superintendent's decision of February 29, 2008, wherein the Superintendent rescinded his letter dated December 14, 2007, and recognized the results of a November 13, 2008 General election conducted by Joe Kennedy and Madeline Esteves. The February 29, 2008 decision recognized the following individuals to be official tribal representatives of the Timbisha Shoshone Tribal Council: Joe Kennedy, Chairman; Margaret Armitage, Vice-Chairman; Madeline Esteves; Secretary/Treasurer, Margaret Cortez; Council Member and Pauline Esteves, Council Member (Kennedy Council).

The Appeal was received on March 18, 2008 and the Appellants' Statement of Reasons was received on April 16, 2008; both were timely filed pursuant to 25 CFR § 2.10. The Administrative Record from the Bureau of Indian Affairs, Central California Agency, Superintendent (Superintendent) was received on December 3, 2008 at this office.

The Appellants are seeking reversal of the Superintendent's decision of February 29, 2008 and assert that the Tribe's Tribal Council consisting of Ed Beaman, Madeline Esteves, Doug Gholson, Virginia Beck and Cleveland Casey, should be recognized. Appellants assert that, as a result of a competing November 13, 2007 General election conducted by Ed Beaman, Virginia Beck and Cleveland Casey, Doug Gholson, Virginia Beck and Cleveland Casey were elected to the three expired terms of the Tribal Council.

We have carefully reviewed the administrative record and documents provided by the parties. Based on our analysis, I am reversing the Superintendent's decision of February 29, 2008,

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because the actions taken by Tribal Council members Joe Kennedy and Madeline Esteves lacked a quorum of the Tribal Council. Therefore, the Bureau of Indian Affairs continues to recognize the Tribal Council that was in place prior to the Superintendent's February 29, 2008 decision, consisting of: Joe Kennedy, Chairman, Ed Beaman, Vice-Chairman, Madeline Esteves, Secretary/Treasurer, Virginia Beck, Executive Council Member, Cleveland Lyle Casey, Executive Council Member. We present our analysis as follows:

Finding of Facts

On July 9, 2007 charges were filed by General Council members Wallace Eddie and Margaret Cortez against Tribal Council members Ed Beaman and Virginia Beck requesting their removal from the Timbisha Shoshone Tribal Council (Tribal Council).

On July 21, 2007, the Tribal Council of the Timbisha Shoshone Tribe conducted a Tribal Council meeting at Fish Lake Valley. The Tribal Council members present at the meeting were; Joe Kennedy, Chairman, Virginia Beck, Madeline Esteves, Lyle Casey and on the phone was Ed Beaman. A quorum of the Tribal Council was established. The charges filed by General Council members; Margaret Cortez and Wallace Eddy against Tribal Council members Ed Beaman and Virginia Beck were discussed. Ed Beaman stated that he did not get the July 9, 2007 letter and Virginia Beck said she received her letter on July 20, 2007. Therefore, no removal action was taken by the Tribal Council and the request for removal of Ed Beaman and Virginia Beck from the Tribal Council filed by the General Council members was rescheduled for the next Tribal Council meeting on August 25, 2007 at Bishop, California.

On August 25, 2007, the Tribal Council of the Timbisha Shoshone Tribe conducted a duly called monthly Tribal Council Meeting at Bishop, California. The minutes of the Tribal Council meeting indicate the following members of the Tribal Council were present; Joe Kennedy, Chairman, Ed Beaman, Virginia Beck, Madeline Esteves, and Lyle Casey. A quorum of the Tribal Council was established.

On August 31, 2007, Chairman, Joe Kennedy sent a letter addressed to the Superintendent informing him of the events that occurred during the Tribal Council meeting on August 25, 2007, and of the charges filed against Council members Virginia Beck and Ed Beaman. He explained that in accordance with the Tribe's Constitution, Article XI, Section 1, 3, the Tribal Council member who is the subject of a removal request, shall not vote nor serve in his or her capacity as a Tribal Council member in the removal proceedings. Therefore, their request to vote on each other's removal was denied. Shortly after, both Ed Beaman and Virginia Beck walked out of the meeting. Joe Kennedy indicated that Ms. Armitage replaced Virginia Beck in order to continue with the Tribe's business.

On September 22, 2007, Ed Beaman, Vice-Chairman, Cleveland Lyle Casey and Virginia Beck called a Special Tribal Council meeting to address the actions taken at the August 25, 2007 meeting. The following resolutions were passed: Resolution #2007-24 declared the attempted illegal removal of Ed Beaman and Virginia Beck null and void; Resolution #2007-25 declared the duly recognized Tribal Council as Joe Kennedy, Ed Beaman, Madeline Esteves, Virginia Beck, and Cleveland Casey, and declared purported Resolution #2007-23 signed by Joe Kennedy

and Madeline Esteves, setting a date for the General Election, null and void; Resolution #2007-26 amended certain provisions of the Timbisha Shoshone Election Ordinance, applicable only to the 2007 General Election, in order to facilitate a General Election in compliance with the Constitution; Resolution #2007-28 appointed an Election Board to supervise and carry out the General Election.

October 15, 2007, letter from Vice-Chairman, Ed Beaman, via facsimile, addressed to the Superintendent requesting a letter stating who the Bureau of Indian Affairs recognizes as the Tribal Council of the Timbisha Shoshone Tribe. A letter dated September 25, 2007, was also attached, addressed to the General Council responding to improper removal actions taken at the August 25, 2007 Tribal Council meeting.

October 29, 2007, letter from Joe Kennedy, Chairman addressed to the Superintendent regarding Virginia Beck and Ed Beaman's relinquishment of their Tribal Council position on August 25, 2007. Included were Virginia Beck and Ed Beaman's removal charges, which were submitted to members of the General Council.

On November 13, 2007, as a result of a dispute within the Tribal Council two General Elections were held; one by Joe Kennedy, Madeline Esteves and Margaret Armitage conducted by Mark Thompson, Indian Dispute Resolution Services, in which 117 ballots were cast with Joe Kennedy, Margaret Cortez, Margaret Armitage, and Pauline Esteves receiving the highest number of votes; the other by Ed Beaman, Virginia Beck and Cleveland Lyle Casey conducted by Joslyn Chvala, of Daniels, Phillips, Vaughan, & Bock in which 55 votes were cast with Doug Gholson, Cleveland Lyle Casey, and Virginia Beck receiving the highest number of votes.

November 15, 2007, a copy of a letter from Ed Beaman to the Timbisha Shoshone Election Committee, appealing the Tribe's November 13, 2007 General Election conducted by the Kennedy Council, alleging that the election was not conducted pursuant to the Tribe's Constitution and Election ordinance.

December 3, 2007, letter from Ed Beaman, addressed to the Superintendent regarding the Election Board's report of the Tribe's 2007 General election conducted by Daniels, Phillips, and Vaughan for Ed Beaman, Virginia Beck and Cleveland Casey was valid and recognized the new elected members of the Tribal Council as: Doug Gholson, Cleveland Lyle Casey, and Virginia Beck, with 55 votes cast in the election. The Election Board found that the election conducted by the Kennedy Council was invalid and void.

December 3, 2007, Mark Thompson, Indian Dispute Resolution Services, Inc. sent a facsimile, to the Superintendent regarding the November 13, 2007 Kennedy Council's Election Results. The purpose of the Memorandum was to certify the results of the Timbisha Shoshone Election conducted by Indian Dispute Resolution Services, Inc. in coordination with the Tribal Council Election Board. The results identified the Election procedures that were followed, 117 absentee ballots cast, total votes for each candidate, and that no appeals were received. The results showed that the new council consisted of Joe Kennedy, Margaret Armitage, Margaret Cortez, and Pauline Esteves.

December 4, 2007, Barbara Durham, Election Board Chairman, sent a facsimile to the Superintendent, providing the Report of Tribal Election and Addendum to Kennedy Council Report of Tribal Election held November 13, 2007, certifying the results to be true and correct. Further, stating that four (4) General Council members were elected to the Tribal Council and the purported vacant Vice-Chairman position will be filled at the first Tribal Council meeting to be held on December 15, 2007.

December 11, 2007, letter from Joe Kennedy addressed to the Superintendent, providing additional documentation and the history of where the Tribe was up to that point. Included was documentation regarding legal cases concerning issues similar to Timbisha and what constituted a resignation.

December 14, 2007, letter from the Superintendent in response to Mr. Kennedy's letter of December 11, 2007, regarding the purported resignation of Ed Beaman, Vice Chairman, and Virginia Beck, Executive Council Member at a Tribal Council meeting held August 25, 2007, and the annual general election conducted on November 13, 2007. The Superintendent, after review of the documents submitted, was unable to recognize any of the actions initiated by the Beaman Council or the Kennedy Council. As a result of the above, for the purposes of continuing the government-to-government relationship with the Tribe, the Superintendent continued to recognize the last duly elected Tribal Council as follows:

Joe Kennedy, Chairman
Ed Beaman, Vice-Chairman
Madeline Esteves, Secretary/Treasurer
Virginia Beck, Executive Council Member
Cleveland Lyle Casey, Executive Council Member

In addition, the Superintendent recommended that the Tribe conduct a special general election to comply with the provisions of the Tribe's Constitution for an annual general election to fill the three expired positions, and that Ed Beaman and Madeline Esteves positions should be held over until November 2008.

December 14, 2007, letter via facsimile from Joe Kennedy responding to the Superintendent's letter of December 14, 2007, objecting to the Superintendent's request for a Special Election and listing the duly elected tribal council elected on November 13, 2007 as follows: Joe Kennedy, Margaret Cortez, Margaret Armitage, Madeline Esteves and Pauline Esteves. (2007 Kennedy Council)

December 17, 2007, letter from Lyle Casey to the Agency Superintendent responding to his December 14, 2007, decision not recognizing the actions taken at a Special meeting of the Tribal Council held September 22, 2007, and subsequent election organized and executed by the Ed Beaman, Virginia Beck and Cleveland Lyle Casey.

January 11, 2007, Notice of Appeal filed by Jack Duran, Attorney on behalf of his clients: Joe Kennedy, Margaret Armitage, Margaret Cortez, Madeline Esteves and Pauline Esteves. The appeal was from the December 14, 2007 decision of the Superintendent for failing to

acknowledge the Tribal Council's determination that Mr. Ed Beaman and Ms. Virginia Beck resigned their tribal council positions at an August 25, 2007 Tribal Council meeting and failing to acknowledge the November 13, 2007, General Council Election whereby Joe Kennedy, Margaret Armitage, Margaret Cortez, Madeline Esteves and Pauline Esteves were elected to serve as members of the Timbisha Shoshone Tribal Council.

January 18, 2008, memorandum from the Superintendent to the Regional Director, transmitting the January 11, 2008 Notice of Appeal filed by Jack Duran, Attorney on behalf of his clients: Joe Kennedy, Margaret Armitage, Margaret Cortez, Madeline Esteves and Pauline Esteves. The Superintendent indicated that the Appellant's Statement of Reason, upon receipt, will be forwarded to this office along with the administrative record.

January 20, 2008, a Special meeting of the General Council was held in Hesperia, CA, to address the results of the November 13, 2007 Tribal Council Elections and to seek approval of specific actions that would stabilize the Tribe's government.

February 4, 2008, letter from Joe Kennedy to the Superintendent in which he updated the Superintendent on the most recent actions that occurred with the Timbisha Shoshone Tribe and notifying him of a special meeting of the General Council held on January 20, 2008, at Hesperia, CA. The purpose of the meeting was to find out what the General Council of the Tribe wanted and what direction they felt was appropriate for the Timbisha. In support of the actions taken by Joe Kennedy, Madeline Esteves and Margaret Armitage, the General Council voted and enacted four (4) Tribal Resolutions as follows: Resolution No. 2008-01, Ratifying the Joe Kennedy, Madeline Esteves and Margaret Armitage's November 13, 2007 General Election; Resolution No. 2008-02 Ratifying the Actions and Authority of the Tribal Council Subsequent to August 25, 2007; Resolution No. 2008-03 Interpreting What Constitutes a Resignation from the Tribal Council; Resolution No. 2008-04 Authorizing the Tribal Council to Pursue Prospective Gaming Developers. Furthermore, the Agency Superintendent was requested to recognize all actions adopted by the Timbisha Shoshone General Council at the January 20, 2008 Special General Council Meeting.

February 29, 2008, the Superintendent, reversed his December 14, 2007 decision and issued a new letter recognizing the actions of the General Council during a January 20, 2008, General Council meeting, wherein the General Council voted to ratify: Tribal Resolutions No. 2008-01, ratifying the Joe Kennedy, Madeline Esteves and Margaret Armitage's November 13, 2007 General Election; Tribal Resolutions No. 2008-02 ratifying the Actions and Authority of the Tribal Council Subsequent to August 25, 2007; Tribal Resolutions No. 2008-03 Interpreting What Constitutes a Resignation from the Tribal Council. Based on the above actions of the General Council the Superintendent recognized the results of the Joe Kennedy, Madeline Esteves and Margaret Armitage's November 13, 2007 election as follows:

Joe Kennedy, Chairman
Margret Armitage, Vice-Chairman
Madeline Esteves, Secretary/Treasurer
Margret Cortez, Executive Council Member
Pauline Esteves, Executive Council Member

APPLICABLE TRIBAL LAW

The Tribe is organized and governed under the Constitution of the Timbisha Shoshone Indian Tribe adopted by its membership on February 17, 1986. In analyzing the parties' positions, it is appropriate to look to the Tribe's Constitution as it relates to the actions taken by the parties

Article IV, Section 1, provides that, the powers of the government of the Tribe shall be divided into three distinct branches; the General Council, the Tribal Council and the Tribal Judiciary. No branch, group or person charged with the exercise properly belonging to one of these branches shall exercise any powers belonging to one of the other branches, except as otherwise specified in this document.

Article IV, Governing Body, Section 2, provides that, the governing body of the Tribe shall be the General Council. The General Council shall consist of all tribal members sixteen (16) years of age or older. All members of the General Council shall be able to vote at all General Council meetings and all tribal elections, referenda, initiatives, recalls and repeals.

Article V, Section 1, General Council, a., provides in part that, all powers of the Tribe shall be vested in the General Council, subject to any limitations imposed upon such powers delegated to the Tribal Council, etc..

Article V, Section 1, General Council, b., provides that, The General Council shall exercise its powers of self-government through initiative, referendum, repeal and recall powers as set forth in this document.

Article V, Section 1, General Council, c., provides in part that, the following powers shall be exclusively reserved to the General Council. All powers that are not expressly mentioned in this document or which are not expressly delegated in this document by the General Council to the Tribal Council or any other officer or agency of the Tribe, shall not be abridged but shall be reserved to the General Council.

Article V, Section 3, Reserved Powers of General Council, provides that, the Tribal Council shall have all appropriate powers necessary to implement specific provisions of this document and to effectively govern tribal affairs. All powers heretofore vested in the Tribe, but not specifically referred to in this document, shall not be abridged, but shall be reserved to the General Council.

Article VII, Duties of Officers Section 1, a., provides in part that, the Chairman shall have the following duties:

1. To preside at all meetings of the Tribal and General Councils;
2. To vote at Tribal and General Council meeting only when it is necessary to break a tie vote;

8. The Chairperson shall hold no other Tribal Office or engage in private remunerative employment which may pose a conflict of interest with the Tribe's enterprise or business activities during his term of office:

Article VIII, Meetings Section 1, provides that, all meetings of the General or Tribal Councils shall be open to all tribal members, except in those cases where the matter under discussion would invade the privacy of an individual tribal member.

Article VIII, Meetings Section 2, provides in part that, all meeting of the Tribal Council shall be held in accordance with the following provisions:

a. A majority of the members of the Tribal Council shall constitute a quorum at all Council meetings. No business shall be conducted in the absence of a quorum.

Article VIII, Meetings Section 3(b), provides that Specials meetings of the General Council may be called by the Tribal Chairperson or by any member of the General Council who submits a petition with ten (10) signatures of the General Council members to the Tribal Council requesting a special meeting. The notice in regard to any special meetings shall be given at least three (3) days prior to the meeting and shall specify the purpose of the meeting.

Article X, Vacancies Section 1, Tribal Council shall fill the vacancy by appointment of a General Council member who qualifies for candidacy for the vacant position. If more than twelve (12) months remain in the vacant term a special election shall be held to fill the vacant position. Such a special election shall be held within thirty (30) days after the Tribal Council declares the position vacant.

Article XI, Removal, Section 1, 1., provides in part that, any member of the Tribe can request removal of any Tribal Council member by submitting a written statement of charges to the Chairperson, etc... Such written statement must be received by the accused Council member no later than ten (10) days before the next regular Council meeting at which he or she is to appear.

Section 1, 2., provides that, at the next regular Tribal Council meeting following the submission of such written statement, the charging party shall present his or her allegations and proof against the accused member of the Tribal Council, and the accused member shall be given an opportunity to reply to all charges by presenting his or her allegations and proof to the Tribal Council.

Section 1, 3., provides that, after hearing all the charges and proof presented by both sides, the Tribal Council shall take a vote on whether the accused member shall be removed from office. If a majority of the Tribal Council vote to remove the accused Council member, his or her seat shall be declared vacant. The Tribal Council member who is subject to the removal request shall not vote nor serve in his or her capacity as a Tribal Council member in the removal proceedings.

DISCUSSION

Review of the minutes of the Tribal Council monthly meeting of August 25, 2007, indicates a quorum had been established with all five (5) Tribal Council members present to, among other things, address removal charges filed by Wallace Eddy, to allow Ed Beaman and Virginia to refute the alleged charges and for the Tribal Council to vote on the matter. Only Wallace Eddy, one of the two General Council members who had filed the charges and requested the removal of Ed Beaman and Virginia Beck from the Tribal Council was present along with 30 General Council members. Ed Beaman and Virginia Beck requested that the removal action be conducted in Executive Session, but the General Council members present opposed their request. Before the charges were presented, a dispute ensued on whether or not Ed Beaman and Virginia Beck could vote on each others removal; Chairman Kennedy referred the matter to the General Council members for a decision. The General Council voted not to allow Ed Beaman and Virginia Beck to vote on each others removal; Chairman Kennedy announced the motion carried. Ed Beaman and Virginia Beck along with Cleveland Lyle Casey left the meeting and did not return. Upon the departure of Tribal Council members Ed Beaman and Virginia Beck along with Cleveland Lyle Casey from the meeting, Chairman, Kennedy stated that Ed Beaman and Virginia Beck leaving before responding to the charges meant they were guilty of the charges. A motion was made by Madeline Frank, General Council member, to remove Ed Beaman and Virginia Beck from the Tribal Council, and seconded by Pauline Esteves, General Council member; however, no vote was taken and the motion died. Another motion was made by Barbara Durham, General Council member, to replace Virginia Beck with Margaret Armitage, General Council member, seconded by Pauline Esteves, General Council member, by a vote of 11 for, 0 against, 0 abstain; the motion carried. Following the motion, Margaret Armitage took a place at the Tribal Council table as an Executive Council member.

The Tribe's Constitution provides specific procedures governing the removal of Tribal Council members. Article XI, Removal, Section 1, Et seq., of the Tribe's Constitution clearly specifies the procedures governing the removal of Tribal Council members, and further specifies that the Tribal Council shall take a vote on whether the accused member shall be removed from office and explicitly states that the Removal of Tribal Council members is delegated to the Tribal Council and not to the General Council. The record indicates that no vote was taken by the Tribal Council to remove Ed Beaman or Virginia Beck from the Tribal Council as required by the Tribe's Constitution. Therefore, Ed Beaman and Virginia Beck both remain members of the Tribal Council.

With the departure of Tribal Council members Ed Beaman, Virginia Beck, and Cleveland Casey, only Joe Kennedy and Madeline Esteves, two of the five Tribal Council members, remained; a quorum no longer existed. No further business of the Tribal Council should have been conducted because Joe Kennedy and Madeline Esteves were the only two of the five Tribal Council members who remained and they did not constitute a quorum. Any action by the Tribal Council without a quorum is a violation of Article VII, Section 2 a., of the Tribe's Constitution, which provides in part, No business shall be conducted in the absence of a quorum.

As the record indicates, two Tribal Councils emerged claiming to be the leadership of the Tribe: Joe Kennedy, and Madeline Esteves, and the other Tribal Council consisting of Ed Beaman,

Virginia Beck and Lyle Casey. Both Tribal Councils conducted separate meetings to prepare for the November 2007 General election. On November 13, 2007, both Tribal Councils conducted their own annual General elections. The record indicates that 55 Tribal members voted in the Beaman Council election and 171 Tribal members voted in the Kennedy Council's election. The Superintendent on December 14, 2007 refused to recognize either election and recommend that the Tribe conduct a special general election to comply with the provisions of the Tribe's constitution for an annual general election to fill the three expired positions.

Joe Kennedy, and Madeline Esteves, on January 20, 2008 conducted a duly noticed General Council meeting at Hesperia, CA; the purpose of the meeting was to seek the Tribe's approval, in particular, the Tribal Council meeting of the August 25, 2007 and the Joe Kennedy and Madeline Esteves' General election results of November 13, 2007. However, as discussed above and based on the record, the actions of August 25, 2007 violated several provision of the Tribe's Constitution.

CONCLUSION

As the record indicates, the August 25, 2007 actions by Chairman Kennedy and the General Council members were beyond the scope of their constitutional authority and far exceed their powers in their attempts to remove Ed Beaman and Virginia Beck. The ratification of these actions by the General Council on January 20, 2008, was inappropriate and also was beyond their constitutional authority, and these actions clearly violated Ed Beaman and Virginia Beck's rights to due process. Furthermore, it would be inappropriate for the Bureau of Indian Affairs to recognize tribal actions that violate provisions of Tribal laws.

For the reason stated above I am reversing the Superintendent's February 29, 2008 decision. Consequently, the Bureau of Indian Affairs continues to recognize Joe Kennedy, Chairman, Ed Beaman, Vice-Chairman, Madeline Esteves, Secretary/Treasurer, Virginia Beck, Executive Council Member, Cleveland Lyle Casey, Executive Council Member, which was the governing body of the Tribe that was recognized prior to the February 29, 2008 decision.

Please be advised that there is also a pending appeal regarding the November 2008 General election of the Tribe, with answers of interested parties due by February 24, 2009, and a decision is likely to be issued shortly thereafter.

This decision may be appealed to the Interior Board of Indian Appeal, 801 North Quincy Street, Arlington, Virginia 22203 in accordance with regulations in 43 CFR§ 4.310 4.340. Your Notice of appeal to the Board must be signed by you or your attorney and must be mailed within 30 days of the date you receive this decision. It should clearly identify the decision being appealed. If possible, attach a copy of the decision. You must send copies of your Notice of Appeal to (1) The Assistant Secretary - Indian Affairs, 4160 MIB, U.S. Department of the Interior, 1849 C Street, N. W. Washington, D.C. 20240, (2) each interested party known to you, and (3) this office. Your Notice of Appeal sent to the Board of Indian Appeals must certify that you have sent copies to these parties. If you file a Notice of Appeal, the Board of Indian Appeals will notify you of further appeal procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a Notice of Appeal.

Sincerely,

A handwritten signature in cursive script that reads "Dal Marin". The signature is written in black ink and is positioned above the typed name.

Regional Director

cc: See Enclosed Distribution List

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	Docket No. 63-001
U.S. DEPARTMENT OF ENERGY)	
)	ASLBP Nos. 09-876-HLW-CAB-01
)	09-877-HLW-CAB-02
(High-Level Waste Repository:)	09-878-HLW-CAB-03
Pre-Application Matters))	
)	Date: March 11, 2009

Certification of Timbisha Shoshone Tribe LSN Document Collection

Pursuant to 10 C.F.R. 2.1009(b), as the official responsible for administration of the Timbisha Shoshone Tribe's responsibility to provide electronic files of documentary material, I hereby certify that the Timbisha Shoshone Tribe, California, has implemented the procedures specified in 10 C.F.R. § 2.1009(a)(2). I also certify that, to the best of my knowledge, we have identified and made electronically available the documentary material specified in 10 C.F.R. § 2.1003, in accordance with the requirements of 10 C.F.R. § 2.1011(b).

Respectfully submitted,

/s/Loreen Pitchford

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket No. 63-001
)	ASLBP Nos. 09-876-HLW-CAB-01
U.S. Department of Energy)	09-877-HLW-CAB-02
)	09-878-HLW-CAB-03
(High-Level Waste Repository:)	
Pre-Application Matters))	
)	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the “**MOTION FOR CERTIFICATION OF LICENSING SUPPORT NETWORK OUT OF TIME FOR GOOD CAUSE**” and “**CERTIFICATION OF TIMBISHA LSN DOCUMENT COLLECTION**” in the above-captioned proceeding have been served on the following persons this 11th day of March, 2009, by Electronic Information Exchange.

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